In the Supreme Court of the United States

OCTOBER TERM, 1927

EDWARD E. JENKINS, Receiver of The National City Bank of Salt Lake City, Utah, et al.,
Petitioners,
vs.
THE NATIONAL SURETY COMPANY,
Respondent.
No. 424

BRIEF OF PETITIONERS' ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS OF COURTS BELOW

The decree of the District Court for the District of Utah in this case dated December 31, 1925, appears at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit dated March 28, 1927 (rehearing denied June 14, 1927), reversing the decree of the District Court appears at page 232 thereof. (18 Fed. [2d.] 707). The Circuit Court's holding on the suretyship aspect of this case is controlled by and rested upon its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., opinion filed February 9, 1927, (17 Fed. [2d] 913). For the convenience of the court we have printed that opinion in full as an appendix to our brief in support of petition for writ of certiorari.

The decree of the District Court in the first case between these same parties involving this same matter appears at

page 107 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof (5 Fed. [2d] 34).

JURISDICTION

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (c. 229, 43 Stat. 936, 938). Writ of Certiorari was granted by this Court on October 31, 1927.

STATEMENT OF FACTS

Edward E. Jenkins is receiver of the National City Bank of Salt Lake City, Utah. Up until January 17, 1922, the day of its failure, the Bank was engaged in a general banking business in Salt Lake City, Utah. E. J. Groesbeck was treasurer of Salt Lake County. Upon his election and qualification as such he, as principal, and the American Surety Company, as surety, gave to Salt Lake County a fidelity bond in the sum of $200,000.00, conditioned upon his safely keeping all funds of Salt Lake County coming into his hands as treasurer. Thereafter Groesbeck deposited funds coming into his hands as treasurer with the National City Bank. To protect his deposit Groesbeck received from the Bank three depository bonds: one for $125,000.00 with the National Surety Company as surety; one for $75,000.00 with the Fidelity and Deposit Company of Maryland as surety, which provided for immediate pro tanto subrogation; one for $25,000.00 with the Massachusetts Bonding & Insurance Company as surety. In addition the Bank delivered to Groesbeck as collateral $360,000.00 par value of the bonds of the Crystal Lake Farms Company.

The National, in its motion filed with the Circuit Court of Appeals to modify its decree, asserted that since the case was tried and argued to the Circuit Court of Appeals the Crystal Lake Farm bonds were sold for a sum somewhat less than $90,000.00.

Despite the sale of those bonds Groesbeck and his assignee, the American, are still unpaid and have no prospect of being paid in full by many thousands of dollars if the decision of the Circuit Court of Appeals stands. The petitioners filed with the Circuit Court of Appeals separate answers to the charge of the National that the sale of the Crystal Farm bonds might affect this case. Those answers appear at pages 257 and 258 of the record and conclusively show that even after the sale of those bonds Groesbeck and the American have not been paid in full and cannot be if the decision of the Circuit Court of Appeals stands. We respectfully refer the court to those replies.

When Groesbeck as treasurer applied to the American Surety Company for his $200,000.00 official bond he agreed to indemnify and save said company free from loss on account of said bond. When the Bank procured the depository bonds from the National Surety Company, Fidelity and Deposit Company of Maryland and the Massachusetts Bonding & Insurance Company it agreed to indemnify and save those companies harmless and free from loss on the depository bonds.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand, and "shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 62-63-64). It will be observed that the National's bond is a guarantee for the whole of Groesbeck's deposit without limitation or condition save as to penalty.

For brevity and convenience Edward E. Jenkins, as receiver, will hereinafter be referred to as receiver; E. J. Groesbeck, treasurer, will be referred to hereinafter as Groesbeck; the National Surety Company as the National, and the American Surety Company as the American, the National City Bank, as Bank.

Upon the day the Bank failed Groesbeck had on deposit $643,094.29. This sum was deposited by him as treasurer of

Salt Lake County, and Salt Lake County has been repaid in full as follows:

By the American Surety Company as surety on Groesbeck's official bond	$200,000.00
By the National Surety Company as depository surety	125,000.00
By the Fidelity and Deposit Company as depository surety	75,000.00
By the Massachusetts Bonding & Insurance Company as depository surety	25,000.00
By dividends from the receiver on account of the treasurer's deposit	218,094.29
Total	$643,094.29

It will be seen that Salt Lake County was made whole not alone by the payment of the depository bonds and dividends but by those payments plus $200,000.00 paid by the American as surety for Groesbeck. The American having paid this sum, together with $23,362.15 interest, and Groesbeck, being indebted to the American in that amount, he thereupon assigned to the American his rights against the Bank and its receiver.

When it became apparent that the County was about to be made whole on account of moneys which Groesbeck had deposited in the Bank, Groesbeck and the American made claim upon the receiver that they were entitled to all future dividends accruing on account of Groesbeck's deposit until such time as they were made whole. At the same time the National Surety Company and the Massachusetts Bonding and Insurance Company, as depository sureties, made claim to the receiver that they, having paid the full penalties of their depository bonds, were entitled to pro tanto subrogation against the receiver to the amount of their payments and were thereafter entitled to receive their pro tanto share of dividends on Groesbeck's deposit even before Groesbeck and the American were reimbursed. *The depository sureties also advanced their claims upon their indemnity agreements and demanded approval of their claims and payment of dividends thereon.*

All parties agreed that by the terms of its bond the Fidelity and Deposit Company was, upon payment of the penalty of its bond, entitled to immediate subrogation in that amount. This resulted in a reduction of Groesbeck's claim from $643,094.29 to $568,094.29. The receiver refused to resolve these conflicting claims without a decree of the court.

Thereupon Groesbeck and the American Surety Company brought suit against the receiver in the United States District Court for the District of Utah. In their complaint the payment by the American, as surety on Groesbeck's official bond, was set up and the claim made by Groesbeck and the American that the American and Groesbeck were entitled to receive all dividends thereafter accruing on account of Groesbeck's claim against said bank until such time as he and the American were made whole.

The receiver answered said suit and filed his bill of interpleader praying that the National and the Massachusetts Bonding & Insurance Company, depository sureties, be required to come into court and set up their claims, if any they had. As a result the National and the Massachusetts Bonding & Insurance Company came into court as interpleaded defendants. They denied the right of Groesbeck and the American to priority in the enjoyment of dividends paid and to be paid on account of Groesbeck's claim. The National moreover asserted that the Bank in its application for depository bond had agreed to indemnify and save it harmless from any loss on account of the issuance of said bond and asserted that it was entitled to have its claim theretofore filed with the receiver in the amount of its depository bond approved and allowed and receive dividends thereon, and specifically prayed for such relief (R. 91, 92, 93).

The American answered the complaint of the National in intervention and denied that the National was entitled to have its claim based upon its alleged indemnity agreement allowed and denied that the National was entitled to receive any dividends from the receiver until after the American and Groesbeck were paid in full. (R. 95, 96).

Upon the issues thus joined the trial was had and the issues were decided in favor of Groesbeck and the American and against the National and the Massachusetts Bonding & Insurance Company. (Attention is invited to decree in first suit. R. 107).

An appeal was taken from that decree to the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 110).

After the affirmance of the District Court's decree in the former case this action was filed in the United States District Court for the District of Utah by the National, wherein it alleges that by reason of the indemnity agreement given to it by the Bank at the time its depository bond was issued, it is entitled to have its claim for $120,000.00 ($5,000.00 having been assigned to the American Indemnity Company) approved and allowed by the receiver and to receive dividends thereon notwithstanding Groesbeck and the American, his surety and assignee, have not been paid in full.

Again the receiver filed his answer and bill of interpleader and prayed that Groesbeck and the American be brought in to show such reasons as they might have why the claim of the National should not be approved and allowed and dividends paid thereon. The American and Groesbeck came into this action as interpleaded defendants. Issue was joined between all parties and a trial had. The District Court held that the subject matter of this action was fully determined and adjudicated by its prior decree and that while the National's claim should be approved and allowed this should be specifically subject to the limitation and qualification that the National should receive nothing from the receiver by way of dividends until Groesbeck and the American his assignee, had been fully repaid the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree, and that the qualified allowance of the National Surety Company's claim should not affect the present basis of computing and paying dividends as established by the receiver upon claims theretofore approved. (R. 51).

This case then went to the Circuit Court of Appeals of the Eighth Circuit and on March 28, 1927, that court in an opinion delivered by District Judge Phillips, concurred in by Circuit Judge Booth and District Judge J. B. Sanborn, reversed the decree of the District Court and directed the District Court to enter a decree requiring the receiver to allow the claim of the National Surety Company on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals held that the subject matter of this controversy was not res judicata and that even though Groesbeck and the American, his assignee and subro-

gee, have not been paid in full, the National, which guaranteed his whole deposit and agreed by its bond to save Groesbeck harmless and free from loss, shall be permitted to deplete the only fund out of which Groesbeck and the American can be made whole.

The suretyship aspect of this case is not discussed by the Circuit Court of Appeals in its decision. The Circuit Court rests its ruling upon that feature of the case upon its decision in the United States Fidelity & Guaranty Co. v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed February 9, 1927) 17 Fed. (2d) 913.

The amount of approved claims against the Bank at the time of the trial of this case was $1,583,926.88. (R. 70). It follows that Groesbeck's claim in the sum of $568,094.29 (R. 67), amounts to more than one-third of all the approved claims. If, therefore, the decision of the Circuit Court of Appeals stands, the result will be that of every dollar paid the National out of the funds of the bank one-third will be received at the loss and expense of Groesbeck.

At the time of the trial the receiver had paid sixty per cent in dividends upon approved claims and at that time estimated that he might be able to pay fifteen per cent additional. (R. 70). Under the decision of the Circuit Court of Appeals the National and its assignee would receive at once sixty per cent, or $75,000.00, more than $25,000.00 of which would otherwise go to Groesbeck and his assignee. It will result under the decision of the Circuit Court of Appeals that the National which guaranteed the whole of Groesbeck's deposit and agreed that it, the National, would in any event lose $125,000.00 before Groesbeck should lose anything, will by depletion of the Bank's assets reduce its loss from $125,000.00 to approximately $40,000.00, depending upon what further dividends may be paid by the receiver, and will at the same time leave Groesbeck, the depositor whom it agreed to protect, unpaid on account of his deposit.

The errors which petitioners urge as ground for reversal of the decree of the Circuit Court of Appeals are:

SPECIFICATION OF ERROR.

1. The court erred in holding that a depository surety of a failed bank is entitled to have its claim, based upon its indemnity agreement with such bank, allowed and dividends paid thereon before the obligee of such surety who deposited funds with the failed bank has been paid in full, where such surety guarantees the whole of such deposit without qualification or limitation save as to the penalty of its bond.

2. The court erred in holding that such surety company, after payment of the penalty of its bond, becomes, by virtue of its indemnity agreement with the failed bank, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the Bank prior to its failure.

3. The court erred in failing to hold that the decision in the first case between these parties adjudicated and disposed of the right of the National Surety Company to recover anything by way of dividends on its indemnity claim until Groesbeck was paid in full.

4. The court erred in failing to affirm and in reversing the decision herein of the District Court of the United States for the District of Utah.

5. The court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver to allow the claim of the National for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors including dividends heretofore paid to general creditors.

6. The court erred in holding and determining that the National is entitled to receive anything by virtue of its contract of indemnity with the Bank until Groesbeck and the American, his assignee and subrogee, have been made whole and until Groesbeck's entire deposit with the Bank has been paid.

7. The court erred in following and applying to this case its decision in the case of United States Fidelity & Guar-

anty Company v. Centropolis Bank of Kansas City, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National and the failed bank as of the date of the execution of the bond, since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired.' ".

8. The court erred in failing to hold that as a matter of contract the bond of the National stood behind Groesbeck's entire deposit and that until that deposit has been paid in full and Groesbeck has been made whole the National can recover nothing on its indemnity agreement.

9. The court erred in failing to hold that it is the final amount left unpaid by the Bank which was intended to be secured and which was secured by the National's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything, and that therefore the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the Bank in competition with Groesbeck, thereby depleting the only fund from which Groesbeck can be made whole, and thereby recouping itself so that it does not lose $125,000.00 clear but substantially reduces that amount by receiving moneys which would otherwise go in part as dividends to Groesbeck and his assignee.

10. The court erred in holding that the National is not barred from maintaining this action under and by reason of the doctrine of res judicata.

ARGUMENT.

I.

THE NATIONAL UNDER ITS CONTRACT, IS NOT ENTITLED TO PARTICIPATE IN THE ASSETS OF THE BANK IN COMPETITION WITH GROESBECK AND OTHER GENERAL CREDITORS UNTIL GROESBECK HAS BEEN PAID IN FULL.

The conditions of the depository bond furnished by the National to Groesbeck are as follows:

> "Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each

> and every month render to the said Edward J. Groesbeck, treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, treasurer as aforesaid, and shall pay over the same, and any part thereof upon the check or written demand of the said Edward J. Groesbeck, treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63, 64).

It will be noted that the bond runs to the treasurer and is conditioned upon the Bank "well and truly keeping all sums of money deposited at all times subject to the check of the treasurer", and is not a guarantee of a deposit of only $125,000.00 as asserted by the National on page 3 of its brief filed in opposition to the granting of the writ of certiorari. It will be further noted that the bond indemnifies Groesbeck against loss and guarantees any and all deposits made, without qualification or limitation save only as to the penalty of the bond. When it accepted Groesbeck's deposit, certainly the Bank agreed with the treasurer to pay back the entire deposit, and the National, by its agreement with Groesbeck—its depository bond—guaranteed the performance of the Bank's agreement.

In the face of the plain terms of the surety's contract with Groesbeck the Circuit Court has held that although Groesbeck has not yet been paid in full the National is entitled to have its claim allowed and to receive dividends in competition with Groesbeck at his loss and expense and is entitled to the immediate payment by the receiver of back dividends amounting to 60 per cent.

To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued "as well after as before" the payment of the penalty of its bond. And yet the Circuit Court of Appeals would allow the National to have its claim allowed and would allow it to receive dividends out of the assets of the Bank in competition with Groesbeck and at his expense; and would direct the immediate payment to the National of 60 per cent of its claim out of the remaining assets of the Bank.

Unquestionably the National might have become surety for the Bank upon the condition that the debt it guaranteed should not exceed the penal sum of its bond or that only so much credit should be extended to the bank as should not exceed the penalty of its bond. But that is not the character of the National's bond. It involves no assumption to say that the National's bond is without limitation save as to its penalty. It guaranteed Groesbeck's entire deposit. That is precisely what the Eighth Circuit Court of Appeals held in the first case between these parties.

Upon what theory then in the face of such an outstanding and as yet unperformed contract can the National, with Groesbeck still unpaid, be allowed to compete with Groesbeck in receiving dividends from the Bank? Certainly the National cannot, by virtue of an independent agreement with the bank to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the receiver until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. And yet this was the very ground asserted and relied upon by both court and counsel for allowing the National to escape from the plain terms of its contract with Groesbeck.

The National seeks to write into its depository and indemnity bond to Groesbeck the provisions of a collateral indemnity which it took from the bank and to which Groesbeck is an entire stranger. That it cannot do. The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon is that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance.

The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guaranty against ultimate loss—a guaranty of the last $125,000.00, or any part of it. Can it be that under its bond the National may recover back out of the assets of the Bank—and out of the very money that Groesbeck placed in the Bank—in excess of $75,000.00 while Groesbeck, according to the record, is still out of pocket on account of his deposit many thousands of dollars? Such is the result if the decision of the Circuit Court of Appeals is allowed to stand. Groesbeck had—and still has—the right to look both to the assets of the Bank and the security of the National's bond for the recovery of his entire deposit. The authorities clearly established that it was his right to receive dividends upon his deposit from the receiver as long as dividends were available, *and then* to call upon the National for the residue of his debt or deposit up to the full penalty of its bond.

The fact that in this case the National paid Groesbeck the penalty of its bond before the receiver ceased to pay dividends does not entitle the National to compete with Groesbeck in receiving dividends from the Bank. Groesbeck did not need protection against loss of that part of his deposit which the bank could repay by way of dividends in the event of failure.

By its bond the National agreed to stand between Groesbeck and ultimate loss on his deposit. As long as any part of his deposit remains unpaid Groesbeck holds the National's agreement to protect him to the extent of $125,000.00. If the National is now allowed to recoup itself from the funds of the Bank the inequity of such result will be apparent from the fact that the money which it receives will be taken out of the fund to which Groesbeck was entitled to look and the integrity of which the National guaranteed. As long as Groesbeck is unpaid to the extent of $1.00 the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort. Otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.

There are many cases to support this contention, and except for the decision of which we now complain we know of no respectable authority to the contrary.

In Maryland Casualty Company v. Fouts, 11 Fed. (2d) 71, the Fourth Circuit Court of Appeals had before it the same questions now presented to this court for review. In that case the Maryland Casualty Company executed, as surety for the Peoples National Bank of Salisbury, a depository bond to the State Treasurer of North Carolina, in the sum of $50,000.00, the bank giving to the Surety an indemnity agreement like the one now relied upon by the National. At the time of the failure of the Salisbury bank it was indebted to the State Treasurer in the sum of $89,579.14. The terms of the National's bond given to Groesbeck are stronger and more comprehensive than those of the Maryland Casualty Company's bond, the essential terms of which are set out in the opinion. Both bonds are general and comprehensive and are without any limitation save as to penalty and in each instance guarantee the whole of the public official's deposit. The two cases cannot be distinguished. After paying the penalty of its bond the Maryland Company brought suit claiming that by reason of such payment it was subrogated to the claim of the State Treasurer of North Carolina to that amount and also "that it was entitled to dividends as any other creditor of the bank, upon the $50,000.00" so paid by it for the bank. There, as here, the treasurer had not been paid in full; there, as here, while the surety company had paid the penalty of its bond the whole debt due the treasurer had not been discharged.

In its brief filed in this court in opposition to our petition for writ of certiorari the National, in discussing the opinion of the Fourth Circuit Court of Appeals, says in italics at page 21:

> "No reference was made, either in the original opinion or in the opinion on rehearing, as to the right's if any, acquired by the surety by reason of its Indemnity Agreement."

This statement seems to us unwarranted and reckless. Early in its opinion (pages 71 and 72) the Fourth Circuit Court of Appeals says:

> "The said amount was paid by appellant without waiving any of its rights under the bond, and expressly reserving its right to hold the People's National Bank of Salisbury under an agreement between the bank and it for the reimbursement of any loss sustained by the surety company under the bond.

> It appeared that, at the time the Maryland Casualty Company executed the bond of $50,000 to B. R. Lacy, state treasurer, the People's National Bank of Salisbury entered into an agreement with the casualty company in connection with the application for, and execution of, said depository bond, the second provision of which agreement is as follows:"

Then follows a quotation of the indemnity agreement relied upon by the Surety in that case, after which the court sets forth the grounds presented by the surety to the trial court for relief. Among those grounds are:

> "(1) That when it paid to the state treasurer of North Carolina $50,000 it was entitled to prove its claim for that sum.
>
> "(3) That it was entitled to dividends as any other creditor of the bank upon the $50,000."

Thereafter the Circuit Court of Appeals sets forth a portion of the trial court's opinion which it affirmed:

> " ' . . . That the plaintiff is not entitled to recover of the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, on its indemnity agreement with the said bank, and that the said Maryland Casualty Company is only entitled to subrogation to the rights of B. R. Lacy, treasurer of the state of North Carolina, as hereinbefore set forth.' "

The Circuit Court of Appeals of the Fourth Circuit affirmed the decision of the District Court upon the theory, primarily, that to permit the Maryland Company to recover would be to allow that company to violate the very terms of its own contract.

While the surety in that case relied in part upon the right to subrogation, it nevertheless pleaded and relied equally upon its indemnity agreement, and the question of its right to recover dividends based thereon was squarely raised by the surety and squarely decided by the court.

The court held that while the surety's bond was in the sum of only $50,000.00, it nevertheless stood behind the entire

deposit. The court developing the point a step further held that until the entire deposit was paid, the agreement of the surety company remained unfulfilled and outstanding and there was *no ground* upon which it could participate in the assets of the bank. The point is so persuasively developed and clearly stated by the court that we submit from its decision the following:

> "To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them . . .
>
> "As long as the undertaking on account of which the security was given remains unpaid, in whole or in part, the one giving the indemnity cannot invoke the aid of a court of equity to save it from the consequence of having to make payments on account of the obligation it gave, by decreeing to it dividends from the estate of the insolvent bank, and leaving the debts of such institution indemnified against unpaid. To allow this to be done would operate most unfairly against the state, whose debt was secured. . . .
>
> "The fact of the indebtedness, on account of which the surety was given, not having been paid in full, alone required the denial of the relief prayed for, as the right of subrogation cannot be availed of to collect an indebtedness by one himself liable for the debt, and which obligation he has not met. The decisions of the courts of last resort, federal and state, and the text writers of the highest standing, have given full and frequent consideration to this subject, and with one accord they sustain the views herein given. . . .
>
> "Appellant's position is purely *contractual*, and until it has met its liability and the state has been paid in *full*, as well for the excess deposits of $39,579.14, as for the *penal amount* of the indemnity bond, it has no right, by subrogation *or otherwise*, in a case

> like the present one, to call upon others to share its burdens."

In the foregoing the court pertinently points out that the surety, while the debt it guaranteed remains unpaid, cannot be decreed dividends from the estate of an insolvent bank, since to just the extent a court of equity allows it to receive such dividends the court saves it, the surety, "from the consequence of having to make payments on account of the obligation it gave". In other words, the surety is not really suffering the penalty it contracted to pay if, while the obligation it indemnified remains unpaid, it can pay that penalty with one hand and receive back dividends to diminish that penalty with the other hand.

The Supreme Court of Michigan in Zimmerman v. Chelsea Savings Bank, 125 N. W. 424, had before it a case involving all of the points which have been relied upon by the National, both in this and in the former case. In that case the American Surety Company as surety relied upon its contract of indemnity, as does the National in this case. It filed its claim in the sum of $50,143.40—the penalty of its bond which it paid—with the receiver, and asked the court to direct the allowance thereof and to order the payment of dividends thereon. There, as here, the surety had written a depository bond for the bank. The state treasurer, relying thereon, deposited state funds. The bank's application for the bond contained an indemnity agreement similar to that running from the Bank to the National in this case. When the Bank failed it had on deposit funds of the state amounting to $685,587.70, to secure which the state held six depository surety bonds, aggregating the sum of $200,000.00, included among which was the American Surety Company's bond of $50,000.00. The surety company upon the demand of the state paid the face of its bond with interest, and in its complaint in intervention urged as its fourth ground of recovery "*that the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment of the bond and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid.*"

Notwithstanding this contention relied upon by the surety in the Michigan case the National in its brief heretofore filed in this court says, at page 20:

> "In the Zimmerman case the question of a right based upon the Indemnity Agreement was in no way de-

cided, and not even remotely referred to in the decree or opinion of the trial Court, nor in the opinion of the Supreme Court."

In disposing of this and other claims made, the court pertinently observed:

"The condition of the bond is that if the said bank shall, in accordance with said contract, safely keep and reimburse and pay over upon demand all moneys belonging to the said state of Michigan deposited with it by said State Treasurer in accordance with said contract, etc., 'then this obligation to be void, otherwise to remain in full force and effect.'

"The language employed is not ambiguous; the ordinary meaning thereof is not doubtful. In terms the liability of the surety is *that of the principal* limited only by the penalty of the bond and by provision for paying no more than such proportion of the total loss sustained by the Treasurer of the state as the penalty of this bond bears to the total of the penalties of all bonds furnished by said bank as principal in favor of said State Treasurer. . . .

"The debt due to the state from the bank is the sum of all deposits. The bank, the principal in the bond, has not paid the debt and upon its failure so to do the surety became at once liable to pay the amount which it had agreed to pay. The surety has paid. It paid the entire penalty of the bond because the debt due to the state from the bank exceeded in amount the aggregate of the penalties of all bonds.

" . . . We reject the theory that a particular bond furnished by a depository of state funds, conditioned like the bond in question here, should be treated as securing a particular deposit of funds. And this as well when the state has the 'good and ample security' which the intervener says it should have taken as when it has not. The deposits in the Chelsea Savings Bank were made, generally, from time to time, and were from time to time

withdrawn. That this would be the course of affairs was to be expected, and that it was so understood is evident. All security was given and accepted for all the deposit, whatever the amount of the deposit might be. If intervener secured and intended to secure any particular deposit of $50,000.00 it had no occasion to provide that it should pay no greater part of any loss than the proportion of the penalty of its bond to the total penalties of all bonds. *Its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.* It is conceded, and the authorities cited by counsel for the intervener sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt. 1 Brandt, Suretyship and Guaranty (3d Ed.) sec. 277; Ellis v. Emmanuel, Law Rep. 1 Echeq. Div. 157; Dumont v. Fry (C. C.) 14 Fed. 293."

The right of the depository surety to enjoy dividends before his obligee is paid in full is discussed and the result for which we contend is reached by the Louisiana court in Board of Health v. Teutonia Bank & Trust Company, 68 So. 748:

"Thus it is seen that the condition of the bond was to secure the return of 'any and all sums deposited' with the bank, and not, as counsel would have it, of a sum equal to the amount of the bond. . . .

"By the said argument of counsel the object of giving the bond would be defeated. The situation was that the plaintiff board stood in no need of a bond for the return of whatever part of the deposits it was sure to recover from the bank either as a going concern or as a concern in liquidation; it stood in need of a bond for that part which would be lost unless a bond was taken; that is to say, for that part not recoverable from the bank. The bond was given to supply that need. According to the argument of counsel, it is not the balance endangered by the possible failure of the bank that is to be secured by the bond, but some part not in danger of being lost, so that, after the surety company has paid this part not in danger of being lost,

it is to be entitled to be reimbursed by the bank. The argument will not hold water; it but renews the question long ago settled in the civil law as to what is to be the effect or operation of a bond given to secure part of the debt either already created or to be created. . . .

"We conclude that the surety company was not entitled to come in competition with the plaintiff board against the dividends to accrue from the liquidation of the bank for the reimbursement of the amount paid on the bond, . . . "

Knaffl v. Knoxville Banking & Trust Co., 133 Tenn. 655, 182 S. W. 232, strongly supports the position for which we contend. The bank involved in that case gave the City of Knoxville a depository bond with one Bacon as one of its sureties. Bacon paid the penalty of the bond upon failure of the bank but did not discharge the bank's entire liability to the city. The conditions of the bond were substantially the same as the conditions of the National's bond to Groesbeck. Upon payment of the penalty of his bond Bacon sought judgment allowing him pro tanto dividends. Observe the Tennessee court's language in support of its ruling denying Bacon relief:

"In the present case Bacon was not liable for the debt beyond the amount of his bond but the obligation to pay the bond was conditioned that the bank should 'well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof'. So that the bond was an obligation limited to $25,000.00 but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. *The full amount of the bond has been discharged by the surety but the condition expressed has not been complied with.* The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. *The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is con-*

cerned, but the cause and determination of that liability is not satisfied in full."

" . . . Had it chosen to do so, the city might have deferred action on the bond until it had received the last dollar from the receiver, and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case. . . .

"The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal obligor can pay, and then resort to the bond for any amount left unpaid not exceeding the amount of the penalty; for it is the final amount left unpaid by the principal which is intended to be secured by the surety."

We submit the two paragraphs last quoted are most cogent in support of our contention that it is the final amount left unpaid by the bank which the National's bond secured—it was for that portion of his deposit which he could not otherwise collect that Groesbeck needed protection and for which the National gave protection.

Suppose Groesbeck had never received anything from the National on account of its bond but had received all the dividends from the Bank that the receiver could pay. Suppose the dividends received had amounted to 60 per cent of his claim and he was still unpaid to the amount of $125,000.00. Suppose he then made demand upon the National for the payment of the penalty of its bond. Would the National then be required to pay Groesbeck the full penalty of its bond according to its terms or would it be entitled to withhold 60 per cent and pay only $50,000.00? In such a case the National would have no claim against the Bank or its receiver on its indemnity agreement until it paid the penalty of its bond, and by then the assets of the Bank would have been entirely exhausted by disbursement of dividends. The National's rights are neither greater nor less depending upon when it pays the penalty of its bond. Clearly in the supposed case it would be compelled to pay the penalty of its bond without recouping

anything by virtue of its indemnity agreement. Can it be, therefore, that by paying the penalty of its bond early the National can so improve its situation as to change its legal rights and recoup itself to the extent of approximately $75,000.00, one-third of it at Groesbeck's expense. The supposed case serves to illustrate clearly to just what extent the National is attempting to violate its agreement with Groesbeck and the rights of other depositors.

The point just now under review is neatly covered by the New York court in Buffalo, etc., Co. v. Title Guaranty & Trust Company, 99 N. Y. S. 883:

> "Was the guaranty of the whole debt, with a limitation on the liability of the surety? *If so, the principal may retain all the dividends, and hold the surety for the residue of the debt up to the extent of the bond. Or, was the guaranty of a limited part of the debt? If so, the dividends are to be applied to the whole debt, and the surety is entitled to a ratable deduction for the sum covered by the bond.* This distinction, although somewhat elusive, rests upon a logical basis, namely, the intention of the parties as gathered from the obligation. *The only limitation in the bond in suit is in the amount of the penalty.* The condition, for a breach of which the penalty becomes chargeable to the surety, is that the bank will repay to the plaintiff all moneys now deposited, or which may hereafter be deposited, upon call. There is no express limitation as to the amount of the deposits, and there is no ground for the inference that the deposits should not exceed the penalty of the bond. *The condition of the bond is the repayment to the plaintiff of all of its deposits and the penalty becomes effective to the extent of the amount thereof unless the condition is fulfilled.* The language of the bond, in connection with the admitted fact that the amount of moneys on deposit with the bank at the time of the execution and delivery of the bond was largely in excess of the penalty of the bond, indicates that the true engagement of the parties was to secure the plaintiff *for any unpaid balance to the extent of the penalty of the bond in case of the insolvency of the bank.*"

Finally, upon this specific point, let us direct the court's attention to its own ruling in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 43 L. Ed. 640, where it is said:

> "Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; . . .
>
> "In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his devidends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entilted to retain their securities until the indebtedness due them is extinguished. . . .
>
> "We can not concur in the view expressed . . . that 'the property pledged is in fact security for no more of the debt, than its value will amount to; and for all the rest, the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken.'
>
> "*We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise*"

We contend that just as the collateral in the Merrill case stood behind the final unpaid balance of the debt it secured so does the bond of the National in this case now stand behind the unpaid balance due Groesbeck and his assignee, the American, on his claim against the Bank.

It was the contractual liability on the part of the surety company which the Supreme Court of Michigan had in mind in the case of Zimmerman v. Chelsea Bank, supra, when it de-

nied the right to recover on the indemnity agreement there asserted and held that the surety company by paying the penalty of its bond had not discharged its full contractual obligation but that "*its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.*"

Precisely on this point of contract, although the surety had paid the penalty of its bond, did the New York court in the case of U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, refuse to allow the surety's claim based upon its indemnity agreement, without protecting the surety's obligee, since to do so "*would violate the spirit of the guaranty.*"

Upon this contractual ground most courts, Federal as well as State, have refused to permit the surety, whose guaranty was without qualification or limitation save as to penalty, to enjoy subrogation until the obligee has been paid in full.

We cite and rely upon a number of cases involving the equitable right of subrogation. These cases are not cited because of any desire to confuse subrogation and indemnity, but because in the cases referred to the courts have subjected the contract of suretyship to such searching scrutiny and have so clearly and persuasively analyzed the nature of the obligation owed to the obligee by the surety. There is no reason assigned by the Courts for the results reached in the subrogation cases which is not equally cogent in support of our position.

In Illinois Surety Company v. U. S., 226 Fed. (7 C. C. A.) 665, it is said:

> "The extent of subrogation depends upon the character of the bond. Unquestionably one may become a surety under a condition that the debt thereby guaranteed shall not exceed the penal sum, or that only so much of the credit to be extended to the principal as shall not exceed the penalty of the bond shall be within its protection. The surety under such a bond could become subrogated to so much of the claim against the principal, even though the creditor were thereby prevented from receiving the balance of his claim in full. We find nothing, however, in the statute that would authorize the court to accept a bond so limited.

> While the amount may be increased as the court may from time to time find it proper, *the object of the statutory requirement is to secure protection not for a part but for all depositors, and not for a portion but for the entire amount of their deposits; that is, for so much thereof as they may be unable to realize from the funds of the bank itself.* Under such a bond, there is no right of subrogation until the creditors shall have obtained from the principal or the surety payment not merely of the penalty but of the debtor's entire obligation."

See also Columbia Finance & Trust Co. v. Kentucky Union Railway, 60 Fed. (6 C. C. A.) 794, wherein it is held:

> "The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. *If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable. Yet this is in effect the result of the contention urged.* The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity."

Of like effect is United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. (6 C. C. A.) 448:

> "The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment

> by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested. Sheldon on Subrogation, Sec. 127; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765. In this case, the loss of the state was $3,000, and the guaranty company paid it in full, but the loss of the city was $8,700, and the guaranty company has paid on account of it only $5,700 (as above estimated). This leaves the city with an unpaid claim of $3,000 against the clerk and the clerk's fund, and the right of action which the city originally had against the bank it was entitled to enforce and collect and to apply the full sum collected upon its claim. *The city thus had, in a very proper sense, two securities to which it might resort and upon both of which it might realize in full until its whole claim was satisfied; these securities being its right of action against the bank and its claim against the guaranty company on the bond.*"

Just so in this case, the National cannot be permitted to take away from Groesbeck a part of the assets which it, under this rule, guaranteed would remain available to him. To do so would prejudice him in the enjoyment of property in which he is still beneficially interested. So, too, in this case Groesbeck, "in a very proper sense," had two securities to which he might resort—his claim against the Bank and his claim against the National. The National cannot deprive him of recourse to either of these sources of relief until his claim is paid, for until that time the obligations of the bond remain outstanding and undischarged.

Finally, how can the present decision of the Eighth Circuit Court of Appeals be reconciled with the following statement in its former opinion in this same matter:

> ". . . Until the creditor be wholly satisfied there ought to be and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him *in any way* in the collection of the residue of his claim. (New

> Jersey, Etc. R. R. v. Wartendyke, 27 N. J. Eq. 658.)"
>
> "The rule deducible from the cases is, that till the creditor is paid in full, no right to subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board."

Surely if the National is now to partake of the funds of the bank it is sitting at the "banquet board". What difference can it make whether access is gained to the board by subrogation or indemnity. The same rights are violated in either event.

Reference is made to the folowing cases announcing the same rule:

> Peoples v. Peoples Bros., Inc., 254 Fed. 489;
> Fidelity & Deposit Company of Maryland v. Wilkinson, 69 So. 865;
> Bank of Fayetteville v. Lorwein, 88 S. W. 919;
> McKenna v. Corcoran, 61 Atl. (New Jersey Eq.) 1026;
> Dickson v. Bailey, 33 Atl 705;
> New Jersey Midland Railway Co. v. Wortendyke, 27 N. J. Equity, 658;
> Opp. v. Ward, 24 N. E. 974;
> Featherstone v. Emerson, 14 Utah 12.

The Circuit Court of Appeals, in the Centropolis Bank case, inferentially sets aside the cases upon subrogation with the observation that it is concerned with the surety's rights not to subrogation but to indemnity. That distinction does not, however, answer either in part or in whole the argument upon which the foregoing subrogation cases are decided, to-wit, that where the surety has not expressly limited its guaranty to the penalty of its bond although its requirement to pay may be limited by such penalty, *its guaranty remains outstanding and remains a continuing contractual obligation after the penalty has been paid and until the obligee's debt or deposit is paid in full.* The contract of the surety is identical whether analyzed and determined in a subrogation case or an indemnity case. Since the vital question is what is the surety's contract, what are the surety's obligations, and since

these questions are analyzed and decided in the subrogation cases, the court does not with good reason in the Centropolis Bank case dispose of such subrogation cases by asserting this is a case of indemnity and not one of subrogation.

The question here is what is the contract between the National and Groesbeck? Once that is clearly determined this case is easy of solution. If we read the decisions correctly the National's contract is not simply an agreement to pay the penalty of its bond. It is also a guaranty of Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond. This has been repeatedly held in numerous decisions both State and Federal. It does not militate against the authorities here cited that some of them involve questions of subrogation as well as of indemnity. The National's contract is the same and so is every other surety company's contract the same whether that contract is reviewed in a subrogation or in an indemnity case. Insofar as the subrogation cases cited go to an analysis of what the surety company's contract is and point out that such contracts embrace not simply an obligation to pay the penalty of the bond but also include a guaranty of the entire deposit, it is submitted they are in point and are entitled to the serious consideration of this court.

The authorities are overwhelming to the effect that a contract such as the National has executed is not discharged by mere payment of the penalty of the bond and that, in the language of the Sixth Circuit Court of Appeals in Columbia Finance & Trust Company v. Kentucky Union Railway, supra, "the liability of the surety for the remainder of the debt continued as well after as before such payment."

It is precisely this contractual ground which the Circuit Court overlooked in its decision in the Centropolis Bank case. The court in that case used the following language:

> "We think that a construction of the bond in the instant case in accordance with the above rule compels the conclusion that it was the intention of all the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000.00, and that the recital in the

> bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000.
>
> The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? *We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract.*"

This reasoning and particularly the concluding sentence fails to take account of the contractual barrier which has prevented the courts in all of the foregoing cases from allowing the relief to the sureties there which was allowed in the Centropolis case and which the Circuit Court would grant the National here. If this contractual barrier does not exist in the present case and stand as an obstacle to the National's recovery then it is submitted that all of the foregoing cases discussed herein have been incorrectly decided.

If the National's bond guaranteed Groesbeck's entire deposit as a matter of specific contract then certainly until that specific contract has been carried out and Groesbeck's entire deposit has been paid the National is not entitled to receive anything either by way of subrogation or of indemnity.

Either the bond of the National was security for Groesbeck's whole deposit or it was not. If that bond was not security for the whole deposit but only for $125,000.00 of said deposit, then the Circuit Court in the previous case should have allowed the National to enjoy subrogation to that extent since by paying the $125,000.00 it would have paid the entire debt for which its bond was security.

If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation then that guaranty in the National's bond likewise bars it *as a matter of contract* from receiving anything by virtue of its indemnity agreement, until Groesbeck's debt has been paid in full. The same principle of contract law and the same obligation of contract is the effective bar to the surety's recovery in each instance and this, as we understand it, is the reasoning back of the decision by the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts and of the Supreme Court of Michigan in the case of Zimmerman v. Chelsea Savings Bank. We submit that the first decision of the Circuit Court settled the contract question. That decision should have been held to be decisive of the present litigation, and therefore, when the Circuit Court permitted a recovery by the National under its indemnity agreement it in effect overrules its previous decision and robs the previous decision of the sound basis upon which it rests, to-wit, the proposition that the National's bond as a matter of contract guaranteed and stood behind the treasurer's entire deposit.

The limited rights which the National has in this case spring from payment. It could enjoy no rights by way of subrogation without payment; it could enjoy no rights by way if indemnity without payment. The authorities are all to the effect that even if the National had secured no express contract of indemnity from the Bank the law, upon payment, would imply such an agreement on the part of the Bank. Can it possibly be that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?

ANALYSIS OF CASES RELIED ON BY CIRCUIT COURT OF APPEALS IN CENTROPOLIS CASE.

Since the Circuit Court of Appeals allowed the question of the respective rights of the parties herein to rest upon a reference and adherence to its opinion in the Centropolis Bank case, it becomes necessary to consider and analyze the authorities therein relied upon. As we understand it, the

Circuit Court of Appeals in the Centropolis Bank case, in determining the contractual relationship of the parties and in construing the surety's bond and especially in determining the scope of its guaranty, elected, in the face of all the foregoing authority, to follow and rely upon the following cases:

American Surety Co. v. National Bank of Barnesville, 17 Fed. (2d) 942;

U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, 117 N. E. 1086;

In Re Daily and Ivins, 19 Fed. (2d) 95.

We believe an examination of the three cases will satisfy this court that they fail to sustain the decision of which we are here complaining.

The case of American Surety Company of New York v. National Bank of Barnesville, supra, was decided by the District Court for the Southern District of Ohio. There the bank, prior to its failure, became the depository for school funds and in order to secure such deposit executed a bond, with the American Surety Company as surety, to the Board of Education in the sum of $6,000.00. The application of the bank contained the usual indemnity agreement in favor of the surety company. At the time of its failure the net indebtedness to the Board of Education was $16,030.47. Upon the bank's failure the surety company paid the full amount of its bond, $6,000.00, to the Board of Education and thereupon filed its bill in equity asserting rights, both by way of subrogation and indemnity.

In its opinion, the court rather elaborately discusses the question of subrogation and refers to numerous decided cases on that point and then concludes that since the whole debt of the Board of Education has not been paid the surety company is not entitled to any rights by way of subrogation. It then proceeds, in the face of such a conclusion, to direct the receiver to deduct from the School Board's claim an amount equal to the penalty of the surety's bond and to allow the surety's claim for that amount, and to further direct the receiver to recover from the School Board "any and all sums paid to it as dividends upon the said amount of $6,000.00." Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights.

The decision of the Ohio District Court is squarely against the previous holding of the Eighth Circuit Court of Appeals in the first case between the parties to the instant suit, which denied the National any rights by way of subrogation; and which refused to in any manner reduce Groesbeck's claim or the dividends he looked to for its payment until he was fully reimbursed.

Not only is the opinion of the Ohio District Court in the Barnesville case at variance with the previous holding of the Eighth Circuit Court of Appeals in the first case between these parties, but also it is contrary to the uniform holding of **the courts and is clearly erroneous.**

A fatal objection to the Ohio case, as we view it, is that it is in conflict with the decisions of this court in Merrill v. National Bank of Jacksonville, supra, and Chemical National Bank v. Aldrich, 176 U. S. 618; 44 L. Ed. 611. The claim of the School Board was $16,030.27. As security for payment of that claim the Board held the bond of the surety company in the sum of $6,000.00. While the penalty of the bond was limited to $6,000.00 the bond contained the guarantee on the part of the surety that the bank would repay *all money* to the Board. Under the decisions of this court the Board was entitled to have its claim approved and allowed and to receive dividends on the full amount thereof without any deduction by reason of any security or collateral which it held.

United States Fidelity & Guaranty Co. v. Carnegie Trust Company, supra, likewise does not support the proposition for which it is cited by the court in its opinion in the Centropolis Bank decision, but in its result is favorable to the contention of the petitioners herein.

There the surety brought suit against the superintendent of the defunct bank, asserting that since it had paid the penalty of its depository bond to certain bankruptcy creditors whose funds had been deposited there, it was entitled either to subrogation to the rights of such creditors or to have its general claim based upon its indemnity agreement allowed. The lower court refused to allow the surety company to share in the dividends to the injury of the bankruptcy creditors on the ground that such action would violate the spirit of the guaranty. On this specific point the court, at page 93, uses the following language:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way

> as to *diminish* the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, *because it would violate the spirit of the guaranty.* The Special Term has so held, and has made full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal."

The language just quoted is from the prevailing opinion of the Court and not from the dissent as the National states at page 40 of its brief opposing granting of writ of certiorari.

In Re Dailey and Ivins. This is a case involving the proof of claims in a bankruptcy matter and this Court has held such a case is not in point in a case involving proof of claims against a receiver of a national bank.

> "The bankruptcy rule which requires the holder of collateral security to exhaust it and credit the proceeds on his claim, or else to surrender it before he can prove his claim, is not adopted for national banks by U. S. Rev. Stat. 5236, providing for a ratable dividend on claims proved or adjudicated." Merrill v. National Bank of Jacksonville, 173 U. S. 131; 43 L. Ed. 640.

We urge, therefore, that the three cases cited in the court's opinion as countervailing Maryland Casualty Co. v. Fouts and Zimmerman v. Chelsea Bank wholly fail, upon analysis, to have any such countervailing force. The Carnegie Trust case, by express reservation, leaves out of consideration the point to which it was cited by the National and an examination of the dissenting opinion discloses that the ultimate effect of the case is in our favor and against the National. The Barnesville case is one wherein subrogation and not indemnity is actually granted contrary to the opinion of the very court which granted it and contrary to the law as settled by this court in the Merrill and Aldrich cases. The Dailey-Ivins case is a bankruptcy case governed by rules peculiar to bankruptcy practice.

II.

DOCTRINE OF RELATION BACK ERRONEOUSLY APPLIED.

The holding that the National may receive dividends from the assets of the Bank before Groesbeck is paid in full was made to rest in this case upon the decision of the Circuit Court of Appeals in United States Fidelity & Guaranty Company v. Centropolis Bank, supra. In that case the court held that a depository surety upon the payment of the penalty of its bond is entitled to compete with the depositor whom it secures even before the depositor is paid in full. This conclusion was reached by resort to the so-called doctrine of relation back.

As applied to this case that doctrine means that while the National did not pay the penalty of its depository bond until several months after the failure of the Bank, nevertheless the relation of debtor and creditor existed from the time the bond was executed and that upon payment of the penalty all rights growing out of such payment related back to the date of the execution of the bond. The court held that this doctrine applied in this case with such force as to give the National the character of a creditor of the Bank as of the date it executed its depository bond to Groesbeck and to clothe it with the right to compete with Groesbeck in the assets of the failed bank even before Groesbeck is made whole.

Any rights which the National has against the receiver arise from the contract between the National and the Bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto. The Bank as principal and the National as surety agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he had acquired against the National and the Bank.

The right of relation back is not one which the surety may enjoy at all events. It "is a legal fiction invented to promote the ends of justice. . . . and it is never allowed to defeat the collateral rights of a third person lawfully acquired." It is invoked by courts of equity to assist only in cases when the witholding if its application would defeat the ends of justice.

In holding that the right of relation back is available to the surety at all events, the Circuit Court of Appeals, we submit, departed from the law as settled by this court in United States Fidelity & Guaranty Company v. Wooldridge, 268 U. S. 234, 69 L. Ed. 932.

In the Wooldridge case the surety company furnished a depository bond to the Gulf, Colorado and Santa Fe Railroad to secure the railroad against loss on account of its deposit in the Cleburne National Bank. The surety company had also furnished a fidelity bond to the Cleburne Bank to protect the bank against the misconduct of its cashier. The bank failed and the surety paid the Railroad the amount of its deposit for which it took an assignment of the Railroad's claim against the Bank's receiver.

Suit was brought by the receiver against the surety on the fidelity bond. In that action the surety relied upon its rights arising from the payment of the depository bond and attempted to set off such payment against the receiver's claim on the fidelity bond. In support of its claim to the set-off the surety company relied upon the doctrine of relation back. If, as the Circuit Court of Appeals held in this case, the doctrine of relation back is available to the surety at all events, the claim of set-off in the Wooldridge case would have been a good defense. This court, however, rejected the application of the doctrine and in concluding its opinion said:

> "The doctrine of relation 'is a legal fiction, invented to promote the ends of justice, and . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired'."

This Court's opinion in the Wooldridge case finds support in Johnston v. Jones, 1 Black, 209, 17 L. Ed. 117, wherein this court says in part:

> "The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kinzie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. *It is a legal fiction, invented to pro-*

> *mote the ends of justice. It is a general rule, that it shall do no wrong to strangers.* It is applied with vigor between the original parties, when justice so required; but *it is never allowed to defeat the collateral rights of third persons, lawfully acquired.* Jackson v. Bard, 4 Johns. 234; Case v. DeGoes, 3 Cai. 262; 18 Vin. Abr. 287, Relation, B: Menvil's case, 13 Coke, 21; Wood v. Ferguson, 7 Ohio St. 291."

The holding of this court upon the doctrine of relation back has been followed by the Supreme Courts of North Dakota, Minnesota and Michigan and by the Circuit Courts of Appeals for the Sixth and Ninth Circuits. We have been unable to find any case except the Centropolis Bank case where a court has permitted the application of the doctrine to interfere with the rights of innocent third persons. The Sixth Circuit Court of Appeals in Springfield National Bank v. American Surety Co., 7 Fed. (2nd) 44, had before it a case where the surety company undertook to set-off a claim of indemnity growing out of the payment of a depository bond against a claim asserted by the receiver of a failed bank on a fidelity bond.

In that case, as in the case at bar, the bank in its application for the bond agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the execution of the depository bond and that agreement was asserted in that case just as it was asserted in this case. It is significant, however, that in the Springfield National Bank case the surety had not only paid the penalty of its depository bond, but the entire claim of the depositor. That case presented a situation where the entire loss indemnified against had been met, but even then the court refused to apply the doctrine of relation back. The court in that case held that the surety company's "potential liability on the depository bond was converted into a claim against the bank when and not until the bank becomes insolvent and unable to repay the state." The court further said:

> "To permit the performace of that obligation—payment of the deposit bond—to defeat a separate surety obligation would eventuate in an unfair distribution of the bank's assets among its creditors."

The Ninth Circuit Court of Appeals followed the same reasoning and reached the same result in Fidelity & Deposit Company of Maryland v. Robinson, 7 Fed. (2nd) 371.

We invite the Courts attention to the following cases wherein the holding is to the same effect:

Storing v. Stutsman, 210 N. W. 653, at 655-6;
Veigel v. Converse, 210 N. W. 162;
Gilbertson v. Northern Trust Co., 207 N. W. 42 at 46;
Zimmerman v. Chelsea Bank, supra.

The holding in the cases just cited to the effect that the date of insolvency of the bank is the date to which resort must be had in fixing claims against the receiver finds support in the case of Merrill v. National Bank of Jacksonville, supra, wherein this court in part says:

> "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency."

The holding that the doctrine of relation back is a legal fiction invented to promote the ends of justice and will never be allowed to work an injustice against innocent third parties becomes at once applicable to this case when the court understands that not only has Groesbeck and the American, his assignee and subrogee, not been made whole but likely never will be.

The fallacy of the National's contention that it is entitled to stand on the same basis as general depositors of the Bank and to now participate with them in the Bank's assets is disclosed by the fact that its payment to Groesbeck in no way increased the assets available for division among depositors generally.

If the penalty of the National's bond had been paid to the Bank or its receiver instead of to Groesbeck the National would be in the same position as others who put money in the bank. Or, if the National's payment to Groesbeck had extin-

guished the claim of Groesbeck so that the bank's assets were relieved of his claim to the benefit of general depositors, then the National's position might be different.

But under Merrill v. National Bank of Jacksonville, supra, and Aldrich v. Chemical National Bank, supra, Groesbeck, notwithstanding the National's payment, is not required to reduce the face of his claim but is entitled to continue to draw dividends on the full amount thereof until he is wholly repaid.

However, there is no prospect of Groesbeck ever being wholly repaid, certainly not unless the decision herein complained of is reversed. Therefore the National's payment to Groesbeck can never inure to the benefit of depositors generally.

It is inequitable to apply the doctrine of relation back in favor of the National because:

1. The National has contributed nothing to the assets of the Bank.

2. The National's payment to Groesbeck has not reduced the outstanding claims against the Bank nor has it resulted in any benefit to any depositor except Groesbeck. It is therefore inequitable to permit the National to become a creditor along with general depositors as of the date of the Bank's failure.

3. As against Groesbeck, it is inequitable and illegal for the National to enjoy dividends at his expense because it violates the promise of the National contained in its bond.

It is unjust for Mr. Groesbeck, who is liable to the American Surety Company for the final deficit herein, to have this case decided upon authority of the Centropolis Bank case. The doctrine of relation back though erroneously applied was applied in the Centropolis Bank case with less violence to the equities of Jackson County than will be the case with Groesbeck if applied here. Jackson County's deposit was $122,-324.59. It received $100,000.00 from depository sureties and had its claim against the receiver allowed for the full amount. Dividends amounting to as little as 20 per cent on that claim would wholly repay Jackson County. The situation in which Groesbeck finds himself is much more unfortunate. Jackson County will doubtless be paid in full even in the face of the

application of the doctrine of relation back, while Groesbeck, in the face of such application, is certain to lose many thousands of dollars.

If by recourse to the doctrine of relation back the National is to be permitted now to recover $75,000 of the $125,000 paid on account of its bond, while Groesbeck is still unpaid, then the doctrine of relation back will have been employed not to promote the ends of justice but to absolve the surety company from the obligation of its contract and to "defeat the collateral rights of third persons, lawfully acquired."

Only by the erroneous application of the doctrine of relation back could the court reach its conclusion in the Centropolis Bank case. Since that doctrine can have no application to such a case as this it follows that with the rejection of the doctrine the decision herein must be reversed.

The National was not a creditor of the Bank at "the date of the declaration of insolvency" and since this court has held that that is the controlling date, the Eighth Circuit Court of Appeals erred in holding that the National can share with those who were creditors and depositors upon that date. Herein lies the fundamental error in allowing the National to share with those who were general creditors and depositors at the time the Bank closed its doors.

III.

COURT'S DECISION WILL RESULT IN UNFAIR DISTRIBUTION OF BANK'S ASSETS AMONG ITS CREDITORS IN VIOLATION OF NATIONAL BANKING ACT

The National Banking Act (R. S. 5236 Section 194, New U. S. Code, Annotated) requires that dividends to creditors of the bank shall be ratable and without preference. The penalty of the National's bond never went into the assets of the bank for ratable distribution to its creditors and if the decision of the Circuit Court of Appeals shall finally result in payment of dividends to Groesbeck on the full amount of his deposit and also to the depository sureties upon the full amount of their bonds, then there is to be paid on account of Groesbeck's deposit an amount disproportionate and unfair to general creditors. Such decision establishes a preference

in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in The National Banking Act. It should be noted that in the Centropolis case the court was dealing with a failed state bank and not a national bank.

At the time the bank failed Groesbeck had on deposit the sum of $643,094.29 for which amount (less $75,000.00 assigned to Fidelity and Deposit Co.) he was entitled under the law to have his claim allowed and approved. He was entitled to receive dividends on the full amount without regard to any collateral which he held. Merrill v. National Bank of Jacksonville, supra.

But, if his depository sureties, after the insolvency of the bank, are entitled to pay the penalties of their bonds and then receive dividends pro rata on the amounts paid, the effect will be that Groesbeck's deposit will draw dividends from the assets of the bank upon its full face value, plus the amount of any depository bonds which he held. This would give his deposit a dividend earning capacity proportionately greater than the dividend earning capacity of other deposits, resulting in a preference against depositors in general and an unfair distribution of the bank's assets.

Clearly to allow the National Surety Company to recover upon its indemnity agreement will "eventuate in an unfair distribution of the Bank's assets among its creditors." A simple case will serve to illustrate the situation. Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has $10,000.00 upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the receiver. If, however, one of the depositors was a custodian of public funds, as in this case, and had taken the precaution to secure a depository bond, then that $10,000.00 deposit under the decision in this case, would receive dividends not simply on such $10,000.00 deposit but also would receive dividends on the additional amount paid in connection with such deposit under the depository bond. In other words, that $10,000.00 deposit, if the depository bond were in the sum of $5,000.00, would draw dividends based on once and a half the amount of the deposit: first, upon the depositor's claim, and, second, upon the indem-

nity contract. The result would be that the other nine depositors would not receive the proportion of the dividends paid which their deposits bear to the total of bank's deposits; and where, as in this case, the depository bond is for a large sum, the "unfair distribution of the bank's assets among its creditors" becomes even more disproportionate. If the law of this case is permitted to stand, the liabilities of a bank will not have a direct relation to its deposits, and depositors will not share equally and in proportion to their deposits, but dividends will be distributed on the basis of deposits plus liability by virtue of indemnity agreements given by the bank in connection with depository bonds.

Appreciation of this resulted in the Sixth Circuit Court of Appeals in the case of Springfield National Bank v. American Surety Company of New York, supra, holding that to allow the claim of the depository surety "would eventuate in an unfair distribution of the bank's assets among its creditors."

If the rule announced by the Eighth Circuit herein is to stand then in the future dividends of failed national banks will not be distributed ratably among depositors; but among depositors and depository sureties. It may easily result, depending upon the number and character of depository bonds taken, that depositors whose deposits aggregate a million dollars may have to share dividends in the event of failure with depository surety companies for an additional 25 or 50 per cent of that amount. This will be most unjust to the ordinary depositor when it is remembered that not a dollar of that additional amount has gone to swell the assets of the failed bank. It is an unfair rule to depositors.

Surety companies, if they desire dividends immediately upon payment of the stipulated penalty of their bonds, may and should contract for conventional subrogation as the Fidelity & Deposit Company did in the instant case. Any other rule is harsh and unreasonable and works unfairly to the ordinary depositor as well as to the obligee of such depository surety. The rule announced makes for an unwarranted increase in the liabilities of the bank after insolvency and in favor of parties who have contributed nothing to the assets of the failed bank.

IV.

DECISIONS OF EIGHTH CIRCUIT COURT OF APPEALS IN THE TWO CASES INVOLVING THIS SAME MATTER CONFLICT.

The decision of the Circuit Court of Appeals of which we complain is in conflict with its decision in the former case between these same parties involving this same fund.

By the decree in the first case it was held that the American, as assignee and subrogee of Groesbeck, should receive all dividends accruing on account of Groesbeck's claim until the American and Groesbeck were made whole; that until such time the National should receive nothing.

The National argues that the first decree does not specifically and in so many words deny its right to participate in the assets by force of its indemnity agreement. But the Circuit Court's decision in the first case affirmed the District Court's decree denying the National the right to in any manner deplete the funds out of which Groesbeck and the American were to be made whole until they had been paid in full. Any other construction renders the first decree ineffectual to accomplish its purpose. If the first decree prevented participation in the funds by the National until Groesbeck and the American are made whole, it would be ineffectual if it left a way open for the National to enter by any other avenue and thereby deplete the funds in the hands of the receiver to Groesbeck's and the American's detriment. We contend that the first decree denied the National the right to participate in the funds in the hands of the receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund.

If we are correct in this position then it becomes at once apparent that both decisions cannot be given full force and effect and if the second decision is to become final, the effect of its becoming final is to nullify its first decision. The first decree, affirmed by the Circuit Court, became final before this case was filed and the Circuit Court of Appeals had no jurisdiction or power to thereafter reverse or modify it.

There is a second ground of conflict between the first and second decisions of the Eighth Circuit Court in this matter. The second decision in this case, as well as that in the Centropolis Bank case, is opposed to fundamental principles of suretyship law which were recognized and approved by the Eighth Circuit Court of Appeals in its first decision, and to that extent and in that respect the second decision is squarely in conflict with the previous decision of that court in this same matter.

It is well established that the rights of a surety can never rise above those of its principal:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced." (37 Cyc. 429).

> "The surety cannot be placed in a more favorable position than the principal." (37 Cyc. 429).

In the first decision by the Eighth Circuit Court of Appeals between these parties that court in its opinion affirmed the foregoing principles and in that connection observed (R. 115):

> "Obviously the Bank cannot complain of its own fraud nor can its surety for ordinarily 'a surety cannot be placed in a more favorable position than the principal'." (37 Cyc. 429).

The application of this principle to the present situation is fatal to the claim of the National that it is entitled to dividends upon its indemnity agreement with the Bank before the Bank has paid to Groesbeck the whole of his deposit. As between Groesbeck and the Bank there can be no argument as to the treasurer's superior right to be paid in full from the assets of the Bank before the Bank can claim anything for its stockholders, and since the National, as surety, cannot be placed in a more favorable position than its principal *this case is effectually reduced to the simple proposition that the National cannot enjoy rights with respect to moneys available for dividends if the bank could not enjoy them.* The National is, therefore, in effect, arguing in this case that to the extent of its claim for dividends, under its indemnity agreement, the Bank *has a right to share with Groesbeck in the moneys*

available for paying dividends; and this before Groesbeck has been paid in full.

The Bank not only guaranteed payment to Groesbeck of his deposit, but indemnified him against loss on account thereof. Once this case is reduced to its simplest terms it is found, by application of the foregoing principle, to be nothing more than a contest between the Bank and Groesbeck, with the National asserting rights under a contract with the Bank, superior to what the Bank itself could assert. If the National cannot be placed in a more favorable position than its principal, the bank, then it would seem clear that the National cannot assert rights to any dividends by virtue of its indemnity agreement with the Bank until Groesbeck has been paid in full.

V.

RES JUDICATA.

The Circuit Court of Appeals erred in holding that the subject matter of this suit was not adjudicated in the first suit between these parties. As a defense to this action the petitioners herein pleaded that the issue of reimbursement was res judicata and had been disposed of by the decision in the first case which was affirmed on appeal by the Circuit Court. The District Court sustained this special defense and its ruling in that connection was assigned and held to be error by the Circuit Court of Appeals.

It will be remembered that the National came into the first suit as an interpleaded defendant. Its complaint in intervention was sworn to (R. 86, 93) and the twelfth paragraph thereof alleges the indemnity agreement between the National and the Bank, and further alleges that the National, following the payment of the penalty of its bond in the sum of $125,000.00, "duly presented its claim in said amount arising out of said bond to said defendant receiver." (R. 90, 91).

Paragraph 5 of the National's prayer in its said complaint in intervention is as follows:

> " '5. That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and

> to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be *allowed* and *approved* and the *defendant receiver ordered to pay to said National Surety Company dividends thereon.*' "

This is not a prayer for subrogation; but a distinct demand for relief by way of indemnity; a demand for the allowance and approval of its indemnity claim and the payment of dividends thereon.

The American filed an answer to the complaint in intervention of the National (R. 95, 98) and in paragraph 8 of that answer the American denied paragraph 12 of the National's complaint in intervention, and challenged its right to recover upon the alleged indemnity agreement now relied upon. Thus we find the National asserting upon its entrance into that case the same indemnity agreement upon which it now relies and praying for the same identical relief which it now seeks.

The allegations of the National's complaint in intervention and the denials of the American's answer squarely put in issue in the first case the right of the National to recover under its indemnity agreement reimbursement as prayed for,—the sole and identical issue involved in the present case.

Upon the trial of that action the National introduced in support of its claim the alleged indemnity agreement upon which it now relies. (R. 117, 122). It was stipulated that the National is now relying upon the same bond, the same indemnity agreement, and upon the same payment of $125,000.00 as were involved in the prior suit. (R. 122).

In the first claim filed with the receiver by the National it demanded not only that it "be subrogated to the rights of the obligee on the above mentioned bond against the funds or estate of the National City Bank of Salt Lake City, Utah," but also "that it be reimbursed for the payment heretofore made to the obligee as above set forth." (R. 99, 105, 106). In presenting that claim at the first trial counsel for the National, after referring to the other documents which made up the exhibit, added "then the claim itself wherein it is recited that the claim is made against the National City Bank for reimbursement and for subrogation." (R. 106). Immediately after the decree in the former suit was affirmed, the National

re-filed its claim with the receiver eliminating the demand for subrogation but re-affirming its demand for indemnity.

It was stipulated that all the parties to this suit were parties to the prior suit (R. 117). There is, therefore, no question under the plea respecting the identity of the parties.

Upon the conclusion of the trial of the first suit the District Judge made and entered his decree, (R. 108), finding "the issues in favor of the plaintiff" and holding in effect that the National was not entitled to receive anything until after the American, as assignee and subrogee of Groesbeck, had been made whole (R. 108-9). That decision was affirmed by the Circuit Court of Appeals on March 27, 1925. (R. 110, 116—5 Fed. 2nd 34). The briefs and record upon the appeal in that case, made a part of the record in this case, leave it beyond doubt that the National not only asserted its alleged indemnity agreement as the basis for relief in the first action, but insistently emphasized its right to recover dividends thereon.

In its appeal in the first case the National, in its eighth assignment, assigned as error the failure of the trial court "to order, adjudge and decree that the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 and interest from June 5, 1922, at the rate of eight per cent per annum, should be allowed and approved." (R. 136). Elsewhere in said assignments the National re-asserted its right to reimbursement by reason of the indemnity agreement given it by the bank. (R. 138).

In its printed brief upon that appeal the National strongly emphasized the indemnity agreement and in making its legal argument gave first consideration to "the legal right of this appellant against said bank arising out of contract," asserting in part:

> "The answer of the appellant concludes with a prayer that its claim against said defendant receiver arising out of the contract of said National City Bank to indemnify and hold it harmless and to reimburse it for any loss on account of its execution of said bond, be allowed and approved, and the defendant receiver ordered to pay this appellant dividends thereon. . . . However, we wish to say at the outset of this argument, and most emphatically, that we rely foremost and primarily upon our

> legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration for its execution of said bond. . . . 'The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the Receiver directed to pay to it dividends thereon.' (Assignment of Error No. 8, R. 126). . . . We fail to see how there can be any question of our legal right to recover from said receiver, based upon said contract of indemnity. At the time of the failure of the bank, this claim was valid and outstanding obligation against the bank upon which a claim may be properly asserted against the Receiver, just as on any other debt of the bank. Such a claim would be provable in bankruptcy or against an estate, and why not against the receiver of this Bank? However, it may be said that this appellant, independent of its indemnity agreement, has the right of subrogation. That may be true, but at the same time such right of subrogation cannot detract from our legal rights.
>
> " . . . The decree complained of herein operates to defeat the legal rights of this appellant against its principal, the said Bank, as well as to work an injustice to the superior equities of this appellant. . . .
>
> "It is therefore most respectfully submitted, that the decree of the trial court herein be reversed, and that a decree be entered herein that the claim of the National Surety Company against said Receiver in the sum of $120,000.00, and the claim of American Indemnity Company against said Receiver in the sum of $5,000.00, be allowed and approved; that the *Receiver of said National City Bank be directed to pay to each of said* appellants dividends on their respective claims. (R. 142-146)."

An examination of those portions of the National's briefs upon the first appeal, which appear in the record beginning with page 138 and continuing to page 147, will disclose numerous and vigorous assertions on the part of the National to the

effect that it was entitled in that action to recover dividends upon the indemnity agreement upon which it now relies. We invite particular attention to them. They show clearly that the National vigorously asserted the right to recover by way of indemnity, independent of subrogation, before the Circuit Court of Appeals.

Our contention that the National's cause of action based upon its indemnity agreement was adjudicated in the first action and that the decree in the firse case is a bar to a subsequent suit upon the same indemnity agreement is, we think, amply supported by the authorities.

This court in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195, in part said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

The parties to this suit and in the former suit are the same. The National in the former case alleged the same indemnity agreement it relies upon here. It prayed for the same relief in the former case for which it prays here. It offered in the former case exactly the same evidence in support of its right to indemnity which it offers here. There is, therefore, in the two suits an identity of parties, an identity of claims asserted and an identity of proof to support the claims. It may be asserted that it was not necessary in the former action to adjudicate the National's rights under its alleged indemnity agreement. As we have pointed out elsewhere herein, however, it was necessary to determine the rights of the National under its alleged indemnity agreement in order to make the

adjudication of all the issues involved in the former suit complete and to make the decree rendered efficacious.

There is here present every element which has led courts to a finding of identity of causes of action in cases involving res judicata.

We invite the attention of the court to the following statements of the law upon the subject:

> " 'It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of res adjudicata applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time . . . The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded. . . .
>
> " 'A former judgment on the merits estops the parties thereto not only as to every ground of recovery which was actually presented in the action in which it was rendered, but also as to every ground which might have been presented. Thus, where the plaintiff in an action claims the right of property in a certain thing, the only question involved is whether the property in question belongs to him or not, and if the action results in favor of the defendant, it will bar any action against the same party for the same property, although the plaintiff failed to set up all the rights upon which he might have relied to maintain his cause of action. So also the judgment in an action to quiet title is conclusive of the

title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of the defendant.' " Hickey v. Johnson, 9 Fed. (2d) 498 (8 C. C. A.).

"The test of the identity of the causes of action is the identity of the facts essential to maintain them." Hottelet v. Garden City Milling Company, 285 Fed. 693 (8 C. C. A.).

"The allegations, it is true, are general, but they were sufficient had the petitioner so desired, to permit the introduction of testimony, including the record of proceedings before the immigration authorities and to allow his discharge if petitioner were entitled to relief on any of the grounds now urged. . . .

"According to the general principles of the doctrine of of res judicata, a former judgment is a bar not only as to matters actually argued and decided, but also as to all other matters which might have been put in issue, argued and decided." Wong Sun v. Fluckey, 283 Fed. 989 at 991.

"The petitioner had full opportunity to offer proof of it at the hearing on the first petition, and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time." Wong Doo v. U. S., 265 U. S. 239, 68 L. Ed. 999.

See also:

Fowler v. Osgood, 141 Fed. 20-24, and cases cited.

The foregoing decisions, in our judgment, state the law upon the subject and are in conflict with the conclusions reached in this case by the Circuit Court of Appeals.

The Circuit Court in denying the plea of res judicata rested its decision upon the ground that the claim of the National in its first suit based upon its indemnity agreement "was not a proper subject for litigation in the former suit." The court in the same paragraph goes on to assert that the National "is not concluded by that decree" since its indemnity claim "is a matter which could not properly have been litigated" and that the National is, therefore "not concluded by that decree although it (the indemnity claim) was put in issue by the pleadings."

Why was the National's claim, based upon its indemnity agreement, "not a proper subject for litigation in the former suit," and why was it a matter "which could not properly have been litigated" therein. The same parties were there as here; the Court had jurisdiction not only of them but of the subject matter as well, and had the jurisdictional power and right to hear and decide the cause of action there pleaded, based upon the indemnity agreement.

In the Centropolis Bank case the Surety relied in one action upon both subrogation and indemnity. The Circuit Court in that case did not hold that the indemnity agreement was not a proper subject of litigation but on the contrary recognized it as properly before the Court and granted relief under it.

Courts of equity boast that they never do things by halves, and that having once taken jurisdiction of a controversy they will retain jurisdiction until the entire controversy between the parties has been disposed of. In accordance with this well recognized equitable principle, it has been the common practice in cases of this character for surety companies to assert at the same time and in the same suit not only rights by way of subrogation but rights by way of indemnity as well. That is what was done in Maryland Casualty Co. v. Fouts, supra, in Zimmerman v. Chelsea Savings Bank, supra, and in the case of American Surety Co. v. Barnesville Bank, supra.

Upon what theory can it be held that although the National's indemnity claim "was put in issue by the pleadings" in the first case that nevertheless "such claim was not a proper subject for litigation in the former suit?"

Since the decision complained of concedes that the National's claim, based upon its indemnity agreement, was "put in

issue by the pleadings" in the first case, and since the same evidence was offered there as here, the same relief prayed for there as here, and since that cause of action is identical with the cause of action here sued upon, and since the parties to this suit were parties to the original suit, and since the court in the original suit, as in this suit, had jurisdiction of both the parties and the subject matter, it is submitted that the decree of the District Court in the first case renders that claim res judicata between these parties.

The District Court in holding this matter res judicata, used the following language:

> "It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.
>
> "In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck before the plaintiff in this case can be paid anything.
>
> "Now you cannot change the decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." . . . (R. 210).
>
> "As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R. 211).

The National in its appeal to the Circuit Court from the decree in the first case placed precisely this construction upon that decree. In its original brief filed with that Court we find this language:

> "The decree complained of herein operates to defeat the legal rights of this appellant against its prin-

> cipal the said Bank, as well as to work an injustice to the superior equities of this appellant." (R. 146).

In said brief the National also asserted:

> "That the decree of the trial court herein be reversed, and that a decree be entered herein that the *claim* of the National Surety Company *against said Receiver* in the sum of $120,000.00, and the claim of the American Indemnity Company against said Receiver in the sum of $5,000.00 *be allowed and approved, that the Receiver of said National City Bank be directed to pay to each of said appellants dividends on their respective claims.*" (R. 146).

In its petition for re-hearing filed with the Circuit Court in the prior case the National used this language:

> "The court erred in affirming the decree herein holding that the American Surety Company is entitled to be first paid in full from the dividends paid and to be paid by the Receiver of the National City Bank *before these appellants receive anything.*" (R. 202).

It would therefore appear that at the time the National was appealing from the first decree it placed the same construction upon that decree as did the District Judge in his oral opinion quoted above.

Where there are two possible interpretations of a decree, that one will be adopted which makes it harmonize with the facts and law of the case and which renders it the more reasonable, effective and conclusive. (23 Cyc. 1101). Moreover, since the National placed the very construction upon the original decree throughout that case which the District Court placed upon it in the present case, this Court will not without strong reason place upon it a different construction. (23 Cyc. 1101; Mooney v. Mooney, 31 N. Y. Supp. 118).

Respondent in its brief in opposition to the petition for writ of certiorari cited no cases to meet the above authorities, but in its brief in the Circuit Court of Appeals cited numerous cases dealing with res judicata. The citation of those authorities, however, discloses a failure to distinguish between cases

where the cause of action or claim sued upon is identical with the cause of action theretofore adjudicated and cases where a former judgment is urged as an adjudication only of some element in the subsequent case. This fundamental difference in the law of res judicata between "the conclusiveness of a judgment" on some one point or fact even though the causes of action be different, as distinguished from that of "bar by former judgment" where the causes of action are the same, as affecting parties to the original litigation or their privies, is to be constantly borne in mind and differentiates entirely the cases heretofore relied upon by the respondent upon this point.

Even if it should be asserted that the issue with respect to the indemnity claim was not in terms passed upon by the District Court in the first case, if, nevertheless, as admitted in the decision complained of, that claim "was put in issue by the pleadings," it is respectfully submitted that the matter is nevertheless res judicata between these parties under the holding of the Eighth Circuit Court of Appeals in

> Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (certiorari denied 263 U. S. 709):

> "A final decree or judgment of a court between parties to a suit therein, of whom and concerning the subject-matter of which it (the court) has jurisdiction renders not only every claim and defense which they made and obtained a decision of, but also every claim and defense that they might have made and that the court might have decided in that suit res judicata between them."

Since the indemnity claim "was put in issue by the pleadings" in the first suit, it is submitted that the decree in that case is conclusive "as to every question which was or might have been presented and determined in the former suit" including the claim now relied upon by the National. Moreover, it should not be forgotten that in the first case the District Court specifically found the *issues* in favor of the plaintiff. (R. 108).

CONCLUSION.

This court, upon reviewing the decision complained of, should reverse the same and order an affirmance of the decree of the District Court because:

1. The subject matter of the present suit is res judicata.

2. The decision of the Centropolis case which is adopted herein involves an erroneous application of the doctrine of relation back permitting the National, which was not a creditor at the time of the failure of the bank, to share with those who were depositors and creditors of the Bank at that time and results in an unfair distribution of assets contrary to the provisions of the National Banking Act.

3. The decision permits the National, in violation of its contract, to compete with Groesbeck in the enjoyment of the dividends while its guaranty to him is still outstanding and unperformed. The decision fails to hold the National to its guaranty of Groesbeck's entire deposit and overlooks the proposition that it is the final amount left unpaid by the bank which the National secured. The decision relieves the National from the payment of the full penalty of its bond and the National is thus discharged from its contractual obligation not by performance but by the decree of the court.

Respectfully submitted,

EMMETT M. BAGLEY,
ROBERT L. JUDD,
PAUL H. RAY,

Counsel for Edward E. Jenkins, Receiver, Petitioner.

A. M. CHENEY,
JOHN JENSEN,
HAROLD M. STEPHENS,

Counsel for E. J. Groesbeck and American Surety Company, Petitioners.